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Second- Order Logrolling: The Impact Of Direct Legislative Amendments To State Constitutions

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Second- Order Logrolling: The Impact Of Direct Legislative Amendments To State Constitutions

Abstract

The year 2018 marks the modern Florida Constitution's golden anniversary- a time of celebration and possible consternation.

KEYWORDS: Legislation, Taxation, Logrolling

SECOND-ORDER LOGROLLING: THE IMPACT OF DIRECT LEGISLATIVE AMENDMENTS TO STATE CONSTITUTIONS

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I. INTRODUCTION

The year 2018 marks the modern Florida Constitution’s golden anniversary—a time of celebration and possible consternation. In the spring of 2017, Florida, for the third time, will convene a Constitutional Revision Commission (“Revision Commission”) to examine the constitution and propose revisions to the document.¹ The Revision Commission, composed

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The opinions and views expressed in this Article do not necessarily reflect those of the Author’s employer, and are the Author’s alone.

1. FLA. CONST. art. XI, § 2.

of thirty-seven Floridians, will spend two years analyzing the Florida Constitution. With this power comes great responsibility. The Revision Commission embodies a unique aspect of state constitutional law, as Florida is the only state with a constitutionally created commission that has the authority to place amendments directly before the citizens for adoption.²

As the day approaches, scholars and politicians have begun floating possible amendments to consider. One proposal would fundamentally transmogrify the Florida Constitution's preamble from "[w]e, the people of the State of Florida" to "we, the Legislature of the State of Florida" and render the constitution nothing more than a souped-up statute.³ Such an amendment would invert James Madison's fundamental constitutional principle that "the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty and a *Constitution*."⁴

The proposed amendment would adopt the Delaware Constitution's provision, which allows any member of the Delaware General Assembly to propose a constitutional amendment. If each house of the Delaware General Assembly adopts the amendment by two-thirds, then the Secretary of State will publish the amendment in various newspapers prior to the next general election. If the Delaware General Assembly, elected after that posting, passes the amendment again by two-thirds, the amendment automatically becomes part of the Delaware Constitution.⁵ In short, the Delaware Constitution may be amended without any direct vote by its citizens.

Why should Florida adopt this proposal? One, it is consistent with America's republican form of indirect democracy. Two, it allows for more constitutional amendments to arise out of fulsome debate on the floor of a legislature. Three, it arguably counteracts the Florida ballot initiative

2. TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 158 (G. Alan Tarr ed. 2011); FLA. CONST. art. XI § 2.

3. FLA. CONST. pmbl.

4. 1 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 182 (2005).

5. The provision specifically provides:

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two thirds of all the members elected to each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of State shall cause such proposed amendment or amendments to be published three months before the next general election in at least three newspapers in each county in which such newspapers shall be published; and if in the General Assembly next after the said election such proposed amendment or amendments shall upon yeas and nays vote be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.

DEL. CONST. art. XVI, § 1.

process that has cluttered the Florida Constitution with provisions, such as the *confinement of pigs*,⁶ *marine net fishing*,⁷ and *high speed rail*.⁸

Yet, despite being consistent with republican principles, this remedy is “worse than the disease.”⁹ As this Article explains, the application of the proposed amendment in Florida would lead to: (1) second-order logrolling and a rider effect due to Florida’s size and the incumbency effect, (2) an end-around to Florida’s fundamental constitutional principles by removing a limitation on the power of the Florida Legislature, and (3) a positive-law based constitution subject to political whims.

II. FUNDAMENTAL DISTINCTIONS BETWEEN LEGISLATION AND CONSTITUTIONS

The structure of America’s polity is, has, and always will be wobbling atop a maelstrom of political emotions of factions counteracting factions, as we live in James Madison’s America.¹⁰ As Madison envisioned: “Ambition must be made to counteract ambition. . . . [For] [i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”¹¹ Madison conjured this remedy because then, just as now:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.¹²

6. FLA. CONST. art. X, § 21. Although cruelty of animals is an important issue deserving much attention and recourse, it arguably is more appropriately addressed in legislation rather than in a constitution. *See infra* Part III.

7. FLA. CONST. art. X, § 16.

8. *Id.* § 19.

9. THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 2003).

10. WILLIAM F. CONNELLY, JR., JAMES MADISON RULES AMERICA: THE CONSTITUTIONAL ORIGINS OF CONGRESSIONAL PARTISANSHIP 233–35 (2010). *See also* Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price*, 52 FLA. L. REV. 249, 267–69, 272–73 (2000) (arguing that Florida has adopted a more *Jeffersonian* view with respect to periodic review and scrutiny of its constitution).

11. THE FEDERALIST NO. 51, *supra* note 9, at 319 (James Madison).

12. THE FEDERALIST NO. 10, *supra* note 9, at 72 (James Madison).

Although legislatures can serve as the great laboratories for innovative, progressive, and illuminating discussions, these same bodies are composed of insatiable factions engulfed in impulses and passions,¹³ which can generate septic discussion focused on passing societal trends that appear provincial when later viewed through the lens of history.

That is why in the eye of every storm, there lay calm waters. In America and every state, those calm waters are constitutions. A constitution provides a stabilizing force during chaotic societal discussions. As a community's mores evolve, the constitution steadies. By its Janus nature, it allocates power to various governmental entities while simultaneously limiting their power.¹⁴ Because power originates from the people,¹⁵ the constitution is a doctrine of limitation rather than positive law; it is more sacrosanct than legislative acts.

As former Florida Supreme Court Justice Parker Lee McDonald explicated:

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.¹⁶

However, state constitutions, in comparison to the Federal Constitution, are on average almost five times longer, due, in part, to the frequency with which they are amended.¹⁷ In fact, state constitutions are

13. See *id.* at 77.

14. Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 478–79 (2000).

15. FLA. CONST. art. I, § 1.

16. Advisory Op. to Att'y Gen. — *Ltd. Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring); see also J. Harvie Wilkinson, III, *Hands Off Constitutions; This Isn't the Way to Ban Same-Sex Marriage*, WASH. POST, Sept. 5, 2006, at A.19. Fourth Circuit Court of Appeal Judge J. Harvie Wilkinson, III argued:

To use the Constitution for prescriptions of policy is to shackle future generations that should have the same right as ours to enact policies of their own. To use the Constitution as a forum for even our most favored views strikes a blow of uncommon harshness upon disfavored groups, in this case gay citizens who would never see this country's founding charter as their own.

Wilkinson, III, *supra* at A.19.

17. James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2150 (2013).

amended nine times more often than the Federal Constitution.¹⁸ Possible causes for such revisions are: (1) evolving political norms, (2) adaptation to modern society, and (3) less laborious amendment processes.¹⁹ As a result, state constitutions are beset by political campaigns for initiatives and proposed amendments rivaling those campaigns of political candidates.²⁰ As constitutions have begun to devolve into “political documents,”²¹ the political changes at the state level may occur through constitutional revisions and amendments rather than through legislative acts.²²

From 2000 to 2012, states witnessed an increase in court-constraining amendments relating to social and economic issues—such as same sex-marriage, tort reform, and abortion—rather than amendments targeting criminal procedure and death penalty rulings, which were prevalent in past periods.²³ This reflects a paradigmatic shift from treating constitutions as staunch documents of invariable principles to unhinged governing documents subject to social and economic whims.

Although distending a constitution with positive law creates a constitutional crisis and an unwieldy limitless document, constitutions are still not so sanctified as to be beyond revision.²⁴ As William Saulsbury stated at the Delaware Constitutional Convention of 1897, “I do not believe in making a Constitution and [locking] it up and throwing the key away, but I do not believe in encouraging a constant uncertainty, conniving of all sorts, or continual agitation for changes.”²⁵ Sharing Saulsbury’s sentiment, the drafters of Florida’s 1968 Constitution provided various manners by which to amend the Florida Constitution.

18. *Id.* For example, Alabama’s Constitution, which dates to 1901, is eighty times the length of the Constitution, and of its 376,000 words, 90% of it is made up of amendments. Jennie Drage Bowser, *Constitutions: Amend with Care*, ST. LEGISLATURES, Sept. 2015, at 14, 17.

19. Cauthen, *supra* note 17, at 2150.

20. *See id.* at 2155.

21. *Id.* (emphasis added).

22. John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2139 (2013).

23. *Id.* at 2108–09, 2113.

24. *See* D’ALEMBERTE, *supra* note 2, at 19 (“Given the willingness of the legislature to propose amendments, the availability of the initiative process to the citizenry, and the frequent review by appointed commissions, it is clear that this history of the Florida Constitution will continue to be written in virtually every election.”).

25. THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS 213 (Harvey Bernard Rubenstein ed., 1997) (alteration in original).

III. PROCEDURES TO AMEND THE FLORIDA CONSTITUTION

The Florida Constitution provides the most ways to amend a constitution. In fact, there are six different ways to amend the Florida Constitution. Under article XI of the Florida Constitution, various mechanisms include: (1) the Revision Commission, (2) initiatives, (3) proposals by the Florida Legislature, (4) a constitutional convention, and (5) a Taxation and Budget Reform Commission (“TBRC”).²⁶ Beyond article XI, the Florida Legislature may eliminate language that is outdated through various constitutional provisions.²⁷ A proposed amendment or revision to the Florida Constitution

shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of [R]evision [C]ommission, constitutional convention, or [TBRC] proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a

26. FLA. CONST. art. XI.

27. These various provisions address transitional changes to articles when revisions were made to the 1885 Florida Constitution. A special thank you to Talbot “Sandy” D’Alemberte for bringing these provisions to the author’s attention as a sixth manner by which the Florida Constitution may be amended. The provisions include:

(a) Under article V, § 20(i), the Florida Legislature has the power, by concurrent resolution, to delete from article V (the article addressing the judiciary), any subsection of section 20 (the Schedule to article V) “when all events to which the subsection to be deleted is or could become applicable have occurred.” However, this legislative determination of fact is subject to judicial review. FLA. CONST. art. V, § 20(i).

(b) Under article VIII, §(6)(g), the Florida Legislature has the power, by joint resolution, to delete from article VIII (providing for local government) any subsection of section 6 (the Schedule to article VIII), “when all events to which the subsection to be deleted is or could become applicable have occurred.” However, this legislative determination of fact is subject to judicial review. FLA. CONST. art. VIII, § 6(g).

(c) Under article XII, §11, the Florida Legislature has the power, by joint resolution, to delete any section of article XII (relating to the Schedule of changes to various provisions of the Florida Constitution), “when all events to which the section to be deleted is or could become applicable have occurred.” However, this legislative determination of fact is subject to judicial review. FLA. CONST. art. XII, § 11.

Interestingly, this sixth manner of amending the Florida Constitution allows for unilateral legislative action with even less barriers than those imposed under Delaware’s Constitution. However, a critical caveat is that the Florida Legislature is limited to deleting dated provisions relating to transitional schedule provisions of the constitution, not the more substantive provisions. See FLA. CONST. art. VIII, § 6(g). Moreover, any *determination of fact* by the Florida Legislature is *subject to judicial review*; hence, a clear check and balance. See *infra* Part V.D (discussing checks and balances).

single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.²⁸

If the amendment is proposed by an initiative, it “shall be submitted to the electors at the general election, provided the initiative petition is filed with the custodian of state records no later than February 1 of the year in which the general election is held.”²⁹

To be adopted, the amendment must be “approved by vote of at least [60%] of the electors voting on the measure.”³⁰

A. *The Revision Commission*

As discussed above, the Revision Commission, since 1978, convenes every twenty years to review the constitution. Although a novel concept developed to provide an apolitical review of the constitution, it is not without its critics.

Commentators have scrutinized the Revision Commission’s appointment process as pure political patronage,³¹ as the sitting Governor, Speaker of the House, and Senate President appoint thirty-three of the thirty-seven members.³² Additionally, one of the remaining four members is a political official—the Attorney General.³³ They argue that this process lacks “any built in force to seat persons who are well prepared professionally to assess how well the existing state constitution serves its proper fundamental purposes . . . to create a governmental structure, to allocate powers among the departments, and to limit the power of all governmental entities.”³⁴

Although the appointment process, by its nature, sways with the political party in power, prior appointees have included well-respected members of the legal community, such as:

- Martha Barnett, a future American Bar Association President;³⁵

28. FLA. CONST. art. XI, § 5(a).

29. *Id.* § 5(b).

30. *Id.* § 5(e).

31. Little, *supra* note 14, at 477–78.

32. FLA. CONST. art. XI, § 2(a).

33. *See id.* § 2(a)(1).

34. Little, *supra* note 14, at 478.

35. *Commissioners and Alternates of the 1997-1998 Fla. Const. Revision Comm’n*, P’SHP FOR REVISING FLA. CONST., http://www.revisefl.com/images/Commissioners_and_Alternates_of_the_1997_Updated.pdf [hereinafter PRFC 1997]; Martha Walter Barnett, HOLLAND & KNIGHT, <https://www.hklaw.com/martha-barnett/> (last visited Dec. 16, 2016).

- Justice Gerald Kogan, a Florida Supreme Court Chief Justice;³⁶
- Toni Jennings, Florida Senate President and future Lieutenant Governor;³⁷
- Stephen N. Zack, a future American Bar Association President;³⁸
- J. Stanley Marshall, CEO of James Madison Institute and former Florida State University President;³⁹
- Jon L. Mills, former Speaker of the House of Representatives, Director of Center for Governmental Responsibility, and future Dean of the University of Florida College of Law;⁴⁰
- Talbot “Sandy” D’Alemberte, a future American Bar Association President, a future President of Florida State University, a future Dean of Florida State University College of Law, and author of law review articles and textbooks on the Florida Constitution;⁴¹
- DuBose Ausley, Fellow of the American College of Trial Lawyers, Chairman of Florida Commission on Ethics, and a future Chairman of Board of Regents;⁴²
- Ben Overton, a Florida Supreme Court Justice;⁴³ and
- LeRoy Collins, former Governor of Florida.⁴⁴

36. PRFC 1997, *supra* note 35; *Justice Gerald Kogan*, FLA. SUP. CT., <http://www.floridasupremecourt.org/justices/retired/kogan.shtml> (last visited Dec. 16, 2016).

37. PRFC 1997, *supra* note 35; *Toni Jennings*, U. CENT. FLA.: TONI JENNINGS EXCEPTIONAL EDUC. INST., <http://tjei.ucf.edu/tonijennings.cfm?L=1&id=1c> (last visited Dec. 16, 2016).

38. PRFC 1997, *supra* note 35; *Stephen N. Zack*, BOIES, SCHILLER & FLEXNER LLP, <http://www.bsflp.com/lawyers/data/0398> (last visited Dec. 16, 2016).

39. PRFC 1997, *supra* note 35; Gerald Ensley, *Former FSU President Stanley Marshall Dies at 91*, TALLAHASSEE DEMOCRAT, (June 9, 2014, 8:27 AM) <http://www.tallahassee.com/story/news/education/2014/06/09/stanley-marshall-fsu-dies/10217275/>.

40. PRFC 1997, *supra* note 35; *Jon L. Mills*, UF LAW, <https://www.law.ufl.edu/faculty/jon-l-mills> (last visited Dec. 16, 2016).

41. *Delegates of the 1977-1978 Fla. Const. Revision Comm’n*, P’SHIP FOR REVISING FLA. CONST., http://www.revisefl.com/images/1977-78_crc_delegates.pdf [hereinafter PRFC 1977]; *Talbot “Sandy” D’Alemberte*, FLA. ST. U. C. LAW, <http://www.law.fsu.edu/our-faculty/profiles/dalemberte> (last visited Dec. 16, 2016).

42. PRFC 1977, *supra* note 41; *DuBose Ausley*, AUSLEY McMULLEN, <http://www.ausley.com/attorney-profile/dubose-ausley> (last visited Dec. 16, 2016).

43. PRFC 1977, *supra* note 41; *Justice Ben F. Overton*, FLA. SUP. CT., <http://www.floridasupremecourt.org/justices/retired/overton.html> (last visited Dec. 16, 2016).

Nonetheless, commentators have valid arguments to challenge the credentials of other appointed members and their abilities to decipher the constitutional dilemmas posed when reviewing a constitution. However, a commission of only lawyers would be nonsensical and a remedy worse than the disease. In fact, the Revision Commission, which drafted the 1968 Florida Constitution, openly debated how many lawyers should be on the commission and whether the President of The Florida Bar should have appointment powers.⁴⁵

Beyond the political criticisms, commentators have challenged the amendments proposed by these commissions and their success rate. Professor Joseph W. Little summed up the criticism: “The touted ‘free of [the] legislative oversight’ feature has transmogrified the ideal of an independent, deliberative, and expert evaluation of the basic governing document of Florida into occasional super-legislative opportunities to ‘one-up’ the Legislature by constitutionalizing non-constitutional issues.”⁴⁶

However, these commissions have produced substantial, constitutional proposals such as: (1) a reapportionment of the legislature, (2) a restructuring of the elective cabinet, (3) an elimination of the popular election of judges, and (4) a local option for selection of judges.⁴⁷

Further, although all of the 1977-1978 Revision Commission’s proposals were rejected by voters, more than 40% of that commission’s substantive proposals are now laws, including grand jury counsel for witnesses, an appointed Public Service Commission, broad public records, and public meeting laws.⁴⁸

Many of these provisions were successfully proposed by the 1998 Revision Commission, initiatives, or the Florida Legislature.⁴⁹ Two primary examples are Florida’s education system and the right to privacy.

The 1978 Revision Commission unsuccessfully proposed changing the composition of the Board of Education from the Governor and members of the cabinet to appointed officials serving six-year terms and the creation

44. PRFC 1977, *supra* note 41; Glenn Fowler, *Ex-Gov. LeRoy Collins Dies at 82; Floridian Led Way in ‘New South’*, N.Y. TIMES, Mar. 13, 1991, at D25.

45. 9 FLA. CONSTITUTIONAL REVISION COMM’N, HEARINGS OF THE FLA. STATE CONSTITUTIONAL REVISION COMM’N 337–55, 362–63 (1966).

46. Little, *supra* note 14, at 478.

47. *Id.* at 484–92.

48. Steven J. Uhlfelder & Billy Buzzett, *Constitution Revision Commission: A Retrospective and Prospective Sketch*, FLA. B. J., Apr. 1997, at 22, 24.

49. *Id.*

of a board of regents overseeing the state university system.⁵⁰ The measure was defeated 1,353,626 votes against with 771,282 votes in favor.⁵¹

However, the 1998 Revision Commission successfully proposed a revision to the Board of Education to be composed of seven members appointed by the Governor for four-year terms.⁵² Additionally, a citizen initiative successfully proposed a single state university system with a board of governors.⁵³

The 1978 Revision Commission also proposed⁵⁴ a very often cited provision—the right of privacy.⁵⁵ The proposed provision stated: “Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.”⁵⁶ Although the amendment was defeated as part of a package of proposed revisions labeled *Basic Document* revisions to the Florida Constitution, the Florida Legislature, two years later, successfully re-proposed⁵⁷ a right of privacy that is codified in article I, section 23 of the Florida Constitution.⁵⁸

Notwithstanding the foregoing debate, the criticisms of the Revision Commission pale in comparison to the criticisms lodged against the initiative process.

50. *Education: Revision of Article IX*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=18> (last visited Dec. 16, 2016).

51. *Id.*

52. *Restructuring of State Cabinet*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-4.pdf>.

53. *Local Trustees and Statewide Governing Board to Manage Florida’s University System 01-07*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/fulltext/pdf/34498-1.pdf>.

54. Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 34–35 (1997) (noting that then-Chief Justice Benjamin Overton proposed a constitutional amendment addressing the right of privacy).

55. *Id.* at 35–41 (discussing the substantial case law addressing Florida’s right to privacy).

56. *Id.* at 35 n.67.

57. *Right of Privacy*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=10> (last visited Dec. 16, 2016).

58. Florida’s Right of Privacy, as currently amended, states: “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” FLA. CONST. art. I, § 23.

B. *The Ballot Initiative Process*

Under section 3 of article XI, the citizens of Florida may propose a revision or amendment of any portion of the Florida Constitution so long as it embraces one subject and matter directly connected therewith.⁵⁹ To invoke this section, the initiating party must file with

the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to [8%] of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.⁶⁰

Although stated succinctly, the initiative provision has generated reams of case law and law review articles.⁶¹ Analyzing the single-subject matter requirement, the Supreme Court of Florida explained that it is a “rule of restraint,” which “avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support.”⁶² In other words, this rule of restraint is to prevent logrolling.⁶³

Logrolling is often “defined as the practice of combining two or more dissimilar subjects into a single act to force simultaneous passage of the varied provisions.”⁶⁴ Logrolling is a double-edged sword in the legislation making process because it facilitates compromise among disparate groups, but can also enhance the capacity of special interests to coopt the legislative process.⁶⁵ In the voting context, the Supreme Court of Georgia succinctly summarized one of the worst externalities of logrolling, stating:

59. FLA. CONST. art. XI, § 3.

60. *Id.*

61. D’ALEMBERTE, *supra* note 2, at 159.

62. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

63. D’ALEMBERTE, *supra* note 2, at 159.

64. Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1641 (2005); see JOHN F. COOPER & THOMAS C. MARKS, JR., *FLORIDA CONSTITUTIONAL LAW: CASES AND MATERIALS* 19 (4th ed. 2006) (“Logrolling is ‘a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.’” (citation omitted)).

65. Kastorf, *supra* note 64, at 1641; see also *id.* at 1644–46 (discussing distinctions between rider logrolling and coattails logrolling).

No voter should be compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves, or, in order to vote against the proposition which he desires to defeat, to vote also against the one which commends itself to the approval of his judgment.⁶⁶

One of the two types of logrolling is “rider logrolling,” in which unpopular measures are buried in a very popular or more complex measure.⁶⁷

Beyond the potential logrolling effect, a greater concern regarding the citizen initiatives is the legislative nature of the proposed amendments, because the process “allow[s] interest groups to utilize state constitutions as socio-economic battle-grounds.”⁶⁸ As Professor Daniel Gordon explained: “Including too many matters within a state constitution can lead to legal fossilization which undermines flexibility in serving the needs of the people through legislative and regulatory processes.”⁶⁹ Gordon is not alone in his sentiment.

Commentators and scholars have criticized the initiative process as bloating the Florida Constitution—a doctrine of restraint—with matters more suitable for statutory laws.⁷⁰ Many of these initiatives reflect highly charged

66. *Id.* at 1638 (quoting *Rea v. City of La Fayette*, 61 S.E. 707, 708 (Ga. 1908)). The Supreme Court of Florida described logrolling as:

The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express the approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all.

Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 339 (Fla. 1978) (per curiam).

67. See Marilyn E. Minger, Comment, *Putting the “Single” Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879, 885 (1991).

68. Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 NOVA L. REV. 413, 415 (1995); DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 243 (2000) (noting the use of the initiative process by wealthy individuals and special interest groups).

69. Gordon, *supra* note 68, at 420.

70. See Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 393–98 (1995); Ryan Maloney, Note, *Smoking Laws, High-Speed Trains, and Fishing Nets a State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative*, 14 U. FLA. J.L. & PUB. POL'Y 93, 99–101 (2002); Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FLA. COASTAL L. REV. 15, 37–39 (2004); Susan L. Turner, *Revising the Role of the Florida Supreme Court in Constitutional Initiatives*, FLA. B. J., Apr. 1997, at 51, 52.

social and economic interest driven proposals—the very issues Justice McDonald reasoned were more appropriate for statutory law—i.e., “legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.”⁷¹

For example, citizen initiatives that have passed include:

- defining “marriage as the legal union of only one man and one woman as husband and wife and . . . that no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized;”⁷²
- “to protect people, especially youth, from addiction, disease, and other health hazards of using tobacco, the Legislature shall use some Tobacco Settlement money annually for a comprehensive statewide tobacco education and prevention program using Centers for Disease Control best practices. Specifies some program components, emphasizing youth, requiring one-third of total annual funding for advertising. Annual funding is 15% of 2005 Tobacco Settlement payments to Florida, adjusted annually for inflation;”⁷³
- “[t]o reduce traffic and increase travel alternatives, this amendment provides for development of a high speed monorail, fixed guideway or magnetic levitation system linking Florida’s five largest urban areas and providing for access to existing air and ground transportation facilities and services by directing the state and/or state authorized private entity to implement the financing,

71. Advisory Op. to Att’y Gen. — Ltd. Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring).

72. *Florida Marriage Protection Amendment 05-10*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=41550&seqnum=1> (last visited Dec. 16, 2016); FLA. CONST. art. 1, § 27. On March 30, 2016, United States District Court Judge Robert Hinkle definitively ruled this amendment to be unconstitutional. *See Brenner v. Scott*, No. 4:14cv107-RH/CAS, 2016 WL 3561754, at *4 (N.D. Fla. Mar. 30, 2016).

73. *Protect People, Especially Youth, From Addiction, Disease, and Other Health Hazards of Using Tobacco 05-19*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=41791&seqnum=1> (last visited Dec. 16, 2016); *see* FLA. CONST. art. X, § 27. Although a serious issue, the allocation of tobacco settlement funds is more appropriate for legislative action rather than the organic law of the state.

acquisition of right-of-way, design, construction and operation of the system, with construction beginning by November 1, 2003;”⁷⁴ and

- “no person shall confine a pig during pregnancy in a cage, crate or other enclosure, or tether a pregnant pig, on a farm so that the pig is prevented from turning around freely, except for veterinary purposes and during the prebirthing period.”⁷⁵

Supporters of these amendments argue that this initiative process is the only way to circumvent a legislature, which will not enact such legislation and is badly malapportioned.⁷⁶ Critics rebut that the proper response by these proponents would be to remove those legislators at the voting booth rather than clog the arteries of Florida’s legal corpus. Even the late Florida Governor, Lawton Chiles, expressed concern regarding the path initiatives have taken, stating:

[W]e never imagined the proliferation of people paying to put initiatives on the ballot. I think this practice flies in the face of what a representative democracy is supposed to be. I believe our country was founded as a representative democracy—not a participatory democracy. There is a very clear difference. In a representative democracy, we elect officials to act on behalf of our people. It’s an important concept for us to understand.⁷⁷

74. *Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System 99-0*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=30427&seqnum=1> (last visited Dec. 16, 2016). This amendment was subsequently repealed by another initiative. *Repeal of High Speed Rail Amendment 04-03*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=34876&seqnum=2> (Dec. 16, 2016).

75. *Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy 00-06*, FLA. DEP’T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=34174&seqnum=1> (last visited Dec. 16, 2016).

76. Thomas C. Marks, Jr., *Constitutional Change Initiated by the People: One State’s Unhappy Experience*, 68 TEMP. L. REV. 1241, 1241 (1995) (“It is generally believed that decades of abuses perpetrated by a badly malapportioned legislature figured heavily in the decision to give the people a shot at constitutional change that did not involve that body.”); John G. Matsusaka, *The Eclipse of Legislatures: Direct Democracy in the 21st Century*, 124 PUB. CHOICE 157, 170 (2005) (noting that without initiatives, legislatures have a monopoly over what proposals are considered).

77. 1 FLA. CONSTITUTIONAL REVISION COMM’N, J. 1997-1998 FLA. CONSTITUTIONAL REVISION COMM’N 1, 5 (1997).

Madison would have concurred.⁷⁸ Further, critics have noted that initiatives tend to be poorly worded, creating greater confusion and opposition among the voters.⁷⁹

One additional concern for initiatives is the financial impact of putting the amendment into action. For example, in 2000, Florida voters approved a statewide high-speed monorail linking Florida's five largest urban areas. The amendment required that the monorail travel at a speed in excess of 120 miles per hour and connect to existing air and ground transportation facilities and that construction begin on or before November 1, 2003.⁸⁰ Absent from the ballot summary submitted to voters were the costs and the source of funding.⁸¹

As such, the Florida Constitution now provides that the Florida Legislature, by general law prior to the election, provide a statement of probable financial impact of any initiative.⁸² Interestingly, these financial impact statements are a double-edged sword—providing more information to voters about the financial impact, but also providing the Florida Legislature an avenue to attack or undermine an initiative it disfavors.⁸³

Although citizen initiatives attract the most attention, less discussion has occurred regarding the Florida Legislature, which has proposed 20% of the amendments to the Florida Constitution.⁸⁴ In fact, since 1978, the Florida Legislature has proposed eighty-nine amendments to the Florida Constitution, eighty-one reaching a ballot vote.⁸⁵ In comparison, only 34 of 337 proposed citizen initiatives reached a ballot vote, or 10% compared to

78. In Federalist Paper No. 10, Madison explicated, “Hence it is that such [direct] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.” THE FEDERALIST NO. 10, *supra* note 9, at 76 (James Madison).

79. See Minger, *supra* note 67, at 886–89.

80. *Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System 99-0*, FLA. DEP'T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=30427&seqnum=1> (last visited Dec. 16, 2016).

81. See *id.*

82. FLA. CONST. art. XI, § 5.

83. See THE FEDERALIST NO. 51, *supra* note 9, at 319 (James Madison) (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

84. See *Initiatives/Amendments/Revisions*, FLA. DEP'T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/> (select “Status: ALL”; then select “RUN QUERY”) (last visited Dec. 16, 2016).

85. See *Initiatives/Amendments/Revisions*, FLA. DEP'T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/> (select “Status: ALL”; select “Sponsor: The Florida Legislature”; then select “RUN QUERY” and do not include “Removed” in calculation) (last visited Dec. 16, 2016).

91% of the Florida Legislature's proposed amendments.⁸⁶ These statistics are consistent with the national norm, as legislative proposals make-up approximately 90% of all amendments to state constitutions.⁸⁷ Why? One reason is the lower barrier to entry for a legislature.

C. *Amendments Proposed by the Legislature*

Under section 1 of article XI of the Florida Constitution, the legislature may propose an "[a]mendment of a section or revision of one or more articles, or the whole" of the Florida Constitution, so long as it is "proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature."⁸⁸ However, unlike the citizen initiatives, the Florida Legislature is not bound by the single-subject rule,⁸⁹ despite the fact that any other legislation proposed by the Florida Legislature must "embrace but one subject and matter properly connected therewith, and the subject [must] be briefly expressed in the title."⁹⁰

The Supreme Court of Florida reasoned this discrepancy exists because the constitutional drafters must have determined that the legislative process provides sufficient opportunity for public hearings, debate, and drafting of any constitutional proposal and that input in the constitutional initiative drafting process is not present.⁹¹ However, this analysis presupposes a legislative majority, which can suppress its passions for ephemeral social issues in order to pursue public good. If it lacks this self-restraint, a legislature will suffer the same ailments that plague the citizen

86. See *Initiatives/Amendments/Revisions*, *supra* note 84; *Initiatives/Amendments/Revisions*, FLA. DEP'T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/> (select "Status: ALL"; check "Made the Ballot"; then select "RUN QUERY") (last visited Dec. 16, 2016).

87. Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 181 (G. Alan Tarr & Robert F. Williams eds., 2006). *But see*, Cauthen, *supra* note 17, at 2157 (noting that over the last thirty years, the use of legislative proposals has decreased by half, while the use of initiatives has nearly doubled).

88. FLA. CONST. art. XI, § 1.

89. See *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984) ("Only the initiative process in section 3 contains the restrictive language that 'any such revision or amendment shall embrace but one subject and matter directly connected therewith.'").

90. FLA. CONST. art. III, § 6. The Supreme Court of Florida reasoned that the purpose of this provision is "to prohibit the aggregation of dissimilar provisions in one law in order to attract the support of diverse groups to assure its passage." *Fine*, 448 So. 2d at 988. As discussed, that is the same concern this author has if Florida were to adopt Delaware's legislative-based amendment process. See D'ALEMBERT, *supra* note 2, at 159 (noting the similarity between article III, section 6 and the single-subject rule for citizen initiatives).

91. *Fine*, 448 So. 2d at 988.

initiatives process⁹² and the constitution will become a vessel for positive law, not a document of definition and restraint.⁹³

If the Florida Legislature wishes to secure political cover for a socially based idea, it does not need to use the constitutional amendment process, because it already has the ability to condition the effectiveness of a law upon some stated contingency, including the approval of electors.⁹⁴ As well, the Florida Legislature may prescribe for referenda by law.⁹⁵ If the legislature were to use the constitutional amendment process instead, it would “lard the constitution with non-constitutional substance.”⁹⁶

D. *Constitutional Convention*

Another avenue for constitutional amendments is the constitutional convention process. The objective of a convention is to revise the whole constitution.⁹⁷ If a majority voting on the question votes for the convention at the next general election following a petition for a constitutional convention, each representative district will elect a member to the convention.⁹⁸ No convention has been called under the modern Florida Constitution.⁹⁹

For the sake of brevity, this Article will not discuss this process further.

E. *Taxation and Budget Reform Commission*

The TBRC was established to address tax and budget reform and has the power to place amendments directly on the ballot for voter approval if two-thirds of the commission approves of the measure.¹⁰⁰ It convenes every twenty years after 2007.¹⁰¹ The TBRC is composed of twenty-five voting

92. See THE FEDERALIST NO. 10, *supra* note 9, at 75 (James Madison) (“When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”).

93. Little, *supra* note 70, at 410. One commentator suggested that article XI, section 1 should be revised so that “[n]o amendment to the constitution may be placed upon the ballot to accomplish a purpose that is within the power of the Florida Legislature” *Id.*

94. See City of Winter Haven v. State, 170 So. 100, 103 (Fla. 1936).

95. FLA. CONST. art. VI, § 5(a).

96. Little, *supra* note 70, at 408.

97. FLA. CONST. art. XI, § 4.

98. *Id.* § 4(b).

99. COOPER & MARKS, JR., *supra* note 64, at 16.

100. FLA. CONST. art. XI, § 6(c); D’ALEMBERTE, *supra* note 2, at 163.

101. FLA. CONST. art. XI, § 6(a). The TBRC first met in 1990 and was originally supposed to meet every ten years. D’ALEMBERTE, *supra* note 2, at 163. The 1998

members—eleven of which are appointed by the Governor, seven of which are appointed by the Speaker of the House, and seven of which are appointed by the Senate President.¹⁰² None of the appointees can be current members of the Florida Legislature; however, four non-voting ex-officio members shall be members of the Florida Legislature.¹⁰³

The TBRC has dual aspects: (1) serving as a constitutional revision commission for tax and budget matters and (2) serving as a special study commission for a broad-ranging study of tax and budget policy with a charge to report to the Florida Legislature.¹⁰⁴ Specifically, the TBRC is tasked with reviewing, among other things, the state budgetary process, revenue needs, expenditure process, the state's tax structure, and governmental productivity and efficiency.¹⁰⁵ Beyond the ability to place constitutional amendments directly on the ballot, the TBRC must issue a report and may propose to the Florida Legislature statutory changes related to taxation and budgetary laws.¹⁰⁶ For the sake of brevity, this Article will not discuss this process further.

IV. DELAWARE'S LEGISLATIVE-BASED AMENDMENT PROCESS

With the backdrop of Florida's current amendment process, we can now evaluate the proposed method employed in Delaware relating to legislative-based amendments.

As previously described, in Delaware, either house of the Delaware General Assembly may propose an amendment to the constitution, and if two-thirds of each house approves the amendment, the Delaware Secretary of State will publish a copy of the amendment three months before the next general election in at least three newspapers in each county. After that publication, if the newly seated Delaware General Assembly after that general election approves by two-thirds in each house, the amendment automatically becomes part of the Delaware Constitution without any further consideration or approval by the voters or any review by the Delaware

Revision Commission successfully proposed a constitutional amendment changing the TBRC to meet in 2007 and each twentieth year thereafter. FLA. CONST. art. XI, § 6(a); *Miscellaneous Matters and Technical Revisions*, FLA. DEP'T STATE: DIV. ELECTIONS, <http://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-9.pdf>.

102. FLA. CONST. art. XI, § 6(a)(1)–(2).

103. *Id.* § 6(a)(1)–(3).

104. D'ALEMBERTE, *supra* note 2, at 163.

105. FLA. CONST. art. XI, § 6(d).

106. *Id.* § 6(e); Little, *supra* note 14, at 482 (discussing how the TBRC, unlike the Revision Commission, has the ability to propose non-constitutional measures rather than forcing positive law into the Florida Constitution, a major criticism of the other amendment processes).

Governor.¹⁰⁷ Delaware is the only state to amend its constitution in this manner.¹⁰⁸

During Delaware's convention, which produced the 1897 Delaware Constitution, Wilson T. Cavender indirectly raised the issue of excluding a popular vote by justifying its absence—specifically, arguing that (1) the amendments did not merit a popular ratification and (2) if they did, the time needed for popular ratification would be too long.¹⁰⁹ As well, another reason raised for this adopted method was that the amendment's publication and the intervening general election served as a proxy for a "popular referendum."¹¹⁰

The assumption underlying this last rationale was that a legislator would be elected on the issue raised in the proposed amendment prior to the vote on the second leg of the amendment. That assumption ignores the greatest danger of this method—second-order logrolling.

As previously noted, logrolling is the practice of combining two or more dissimilar subjects into a single act to force a simultaneous passage of the varied provisions. However, the externality this Article addresses is not the act of jamming two dissimilar provisions into one bill, but rather a form of rider logrolling of the second-order, in which, as discussed more fully below, voters are forced into a Hobson choice: to accept an amendment, which they disfavor, or not re-elect an individual with whom they agree on the majority of issues; i.e., take the bitter and the sweet.¹¹¹ Hence, if the voter re-elects the incumbent, passage of the amendment on the second leg is more than likely.

This further assumes that the voter is able to gather sufficient information by which to vote on the amendment, while also evaluating the candidate for election on a panoply of issues. Interestingly, this amendment method could generate a rider effect, as well.¹¹²

107. DEL. CONST. art. XVI, §§ 1, 4.

108. Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 143 n.2 (1995); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J. OF L. & PUB. POL'Y 295, 298 n.11 (2008)). A constitutional convention is the only other manner by which Delaware amends its Constitution. DEL. CONST. art. XVI, § 2; Krislov & Katz, *supra* note 108, at 301 n.23. The Delaware Constitution does not permit amendments by popular initiative or through a commission. See DEL. CONST. art. XVI.

109. THE DELAWARE CONSTITUTION OF 1897: THE FIRST 100 YEARS, *supra* note 25, at 209–10.

110. *Id.* at 210.

111. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 706 (2010) ("Courts disdain logrolling because it requires voters to decide more than one issue with a single vote and threatens to give legal force to policies that command only minority support.").

112. See Cooter & Gilbert, *supra* note 111, at 707–08.

Because of its expediency, the Delaware General Assembly has employed this process frequently.¹¹³ Since the 1995-1996 session, the Delaware General Assembly has considered 196 amendments, including second legs of an amendment.¹¹⁴ Within these amendments, one notes certain trends. For example, in every session from the 1995-1996 session through the 2011-2012 session, State Senator David B. McBride has offered an amendment to require that voters ratify constitutional amendments and that voters be permitted to offer amendments through initiatives and referenda.¹¹⁵ McBride's amendment proposed that after the General Assembly approved the amendment, the voters would vote on the amendment at the next general election. If the voters approved, the amendment would become part of the Delaware Constitution; if the voters reject the proposed amendment, the General Assembly could not submit the proposed amendment for a period of three years.¹¹⁶ McBride's proposed amendments, with one exception, never made it out of the Delaware Senate Executive Committee.¹¹⁷

Beyond these efforts to assert popular, direct democracy into the constitutional revision process, another trend appeared to develop. Beginning in the 2004-2005 session, the amendments began to shift from proposals addressing qualifications for attorney general, residency of the secretary of state, and court jurisdictions to more social and economic issues regarding consideration for stock issuance, prohibition on the recognition of same-sex relationships, and expansion of the gaming industry—all topics more appropriately addressed through the Delaware Code, rather than its

113. THE DELAWARE CONSTITUTION OF 1897: THE FIRST 100 YEARS, *supra* note 25, at 211.

114. Appendix of the proposed amendments to the Delaware Constitution is on file with the Author.

115. See S.B. 5, 138th Gen. Assemb., Reg. Sess. (Del. 1995); S.B. 30, 138th Gen. Assemb., Reg. Sess. (Del. 1995) (defeated); S.B. 23, 139th Gen. Assemb., Reg. Sess. (Del. 1997); S.B. 24, 139th Gen. Assemb., Reg. Sess. (Del. 1997); S.B. 4, 140th Gen. Assemb., Reg. Sess. (Del. 1999); S.B. 7, 140th Gen. Assemb., Reg. Sess. (Del. 1999); S.B. 108, 141st Gen. Assemb., Reg. Sess. (Del. 2001); S.B. 107, 141st Gen. Assemb., Reg. Sess. (Del. 2001); S.B. 24, 142d Gen. Assemb., Reg. Sess. (Del. 2003); S.B. 25, 142d Gen. Assemb., Reg. Sess. (Del. 2003); S.B. 7, 143d Gen. Assemb., Reg. Sess. (Del. 2005); S.B. 8, 143d Gen. Assemb., Reg. Sess. (Del. 2005); S.B. 12, 145th Gen. Assemb., Reg. Sess. (Del. 2009); S.B. 13, 145th Gen. Assemb., Reg. Sess. (Del. 2009); S.B. 60, 146th Gen. Assemb., Reg. Sess. (Del. 2011); S.B. 72, 146th Gen. Assemb., Reg. Sess. (Del. 2011); S.B. 73, 146th Gen. Assemb., Reg. Sess. (Del. 2011); S.B. 12, 147th Gen. Assemb., Reg. Sess. (Del. 2013); S.B. 13, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

116. See, e.g., S.B. 8, 143d Gen. Assemb., Reg. Sess. (Del. 2005).

117. See *supra* note 115.

constitution.¹¹⁸ Currently, if the Florida Legislature proposed such amendments, they would be subject to voter ratification; however, in Delaware, there is no check and balance by the voters, by the governor, or by the Supreme Court of Delaware. Thus, Delaware, through its current amendment process, expedites the legislating of a constitution, denigrating it from a doctrine of restraint to scrap paper of ephemeral social mores, subject to the changes in societal views and political majorities.

For example, in 2004, a Delaware senator proposed prohibiting the recognition of same-sex marriages.¹¹⁹ At that time, 55% of Americans opposed same-sex marriage and 42% were in favor of it.¹²⁰ As of 2015, 60% of Americans approved of same-sex marriage, while only 37% disapproved.¹²¹ If the 2004 amendment had been adopted, it would have created a constitutional dilemma for Delaware in 2013 when it took the appropriate, non-constitutional path of amending its code to provide for same-sex marriages, rather using a constitutional amendment.¹²² This provides a cautionary tale about *larding* the constitution with legislative matters.

V. COULD DELAWARE'S LEGISLATIVE AMENDMENT PROCESS BE IMPLEMENTED IN FLORIDA?

When the Revision Commission evaluates possible amendments to propose, it should reject the proposal to provide for legislative amendments, consistent with the Delaware process. If Florida were to adopt the Delaware process, it would give the legislature unbridled power to amend the constitution, subject to its prevailing passions, regardless of which political persuasion was in power. This is because no fundamental check and balance on the legislative power would exist.¹²³ Such checks and balances are

118. H.B. 399, 143d Gen. Assemb., Reg. Sess. (Del. 2004); S.B. 246, 143d Gen. Assemb., Reg. Sess. (Del. 2004); S.B. 15, 143d Gen. Assemb., Reg. Sess. (Del. 2005); H.B. 440, 144th Gen. Assemb., Reg. Sess. (Del. 2006); S.B. 156, 144th Gen. Assemb., Reg. Sess. (Del. 2007); S.B. 156, 145th Gen. Assemb., Reg. Sess. (Del. 2008).

119. S.B. 246, 143d Gen. Assemb., Reg. Sess. (Del. 2004).

120. *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/marriage.aspx> (last visited Dec. 16, 2016).

121. *Id.*

122. See Doug Denison, *Delaware Becomes 11th State with Gay Marriage*, USA TODAY (May 7, 2013, 9:33 PM), <http://www.usatoday.com/story/news/nation/2013/05/07/delaware-gay-marriage/2142703/>.

123. It is worth noting that other authors have suggested a similar proposal for legislative amendments. See Little, *supra* note 70, at 407. For example, one author suggested that the two houses of the Florida Legislature sit together to adopt a joint resolution to propose a constitutional amendment and that the resolution be approved by no less than three-fifths of the membership of each house in two successive regular sessions with an intervening

necessary to a functioning polity, as “[a] dependence on the people is, no doubt, the primary control on the government.”¹²⁴ By removing the direct popular ratification of legislative amendments, no direct check exists on the legislative amendment—not even a gubernatorial veto or one-subject requirement.

Instead, what remains under a Delaware approach is the ultimate example of second-order logrolling. Florida voters may face the binary choice of re-electing a public official, with whom they may agree with 75% of the time, or electing another person purely on a single-issue encompassed in the proposed amendment that would be voted upon for a second time in the next legislative session. With the incumbency effect, this may not even be a true choice, and the indirect, electoral review of the amendment may be nothing more than a pro forma.

Before analyzing the legal and political effect of implementing the Delaware method in Florida, this Article will first analyze the practical impediments.

A. *Delaware vs. Florida*

Practical implementation of Delaware’s legislative amendment process illustrates its infeasibility in Florida.¹²⁵ Delaware’s population is 945,934,¹²⁶ in comparison to Florida’s population of 20,271,272.¹²⁷ In terms of its legislative composition, Delaware’s General Assembly is composed of 21 senators¹²⁸ and 41 representatives,¹²⁹ while the Florida Legislature is

election of the House of Representatives. *Id.* At that point, the Florida Legislature could place the amendment on the ballot. *See id.* at 407–08. In that proposal, that author was addressing the overload of legislative proposals, but nonetheless still retained a popular review of the amendment before its enactment. *See id.* Another author proposed that before any amendment or revision to change article I of the Florida Constitution may appear on a general election ballot, that proposal, change, or amendment must be approved by the Florida Legislature after two consecutive general elections. Gordon, *supra* note 68, at 429. Again, that author’s proposal, which limits use of initiatives as “tools in socio-economic struggles in Florida,” still required a popular review before enactment. *Id.* at 428–29.

124. THE FEDERALIST NO. 51, *supra* note 9, at 319 (James Madison).

125. DEL. CONST. art. XVI, § 1.

126. *QuickFacts: Delaware*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/10> (last visited Dec. 16, 2016).

127. *QuickFacts: Florida*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/12,10> (last visited Dec. 16, 2016).

128. *Senate Members and Districts-Delaware General Assembly*, DEL. ST. LEGISLATURE, <http://legis.delaware.gov/Senate> (last visited Dec. 16, 2016).

129. *House Members and Districts-Delaware General Assembly*, DEL. ST. LEGISLATURE, <http://legis.delaware.gov/House> (last visited Dec. 16, 2016).

composed of 40 senators¹³⁰ and 120 representatives.¹³¹ In other words, Florida's House of Representatives, alone, is nearly double that of the entire Delaware General Assembly. Based on these demographics, it is unlikely for an electorate to make a significant realignment of members in Florida, such that voters can prevent ratification of an amendment during the second leg of voting. In contrast, in Delaware, the population is more compact, and with less of a voting population, the electorate can alter the make-up of the General Assembly more readily were the General Assembly to adopt an amendment contrary to the best interest of the polity.

B. *Incumbency Effect and Its Interplay with Second-Order Logrolling*

Regardless of Florida's demographics, the likelihood of a change of the electorate before the second leg of voting is minimal when one considers the current redistricting process¹³² and the incumbency effect.¹³³

According to the Quinnipiac Poll, Floridians consistently have held a low approval rating of the Florida Legislature's job performance, with the disapproval rating as high as 50%.¹³⁴ Despite that fact, in 2012, 96% of the incumbents in the Florida Legislature standing for re-election prevailed.¹³⁵ This poses a quandary: How can voters disapprove of the legislature yet continue to re-elect the same members serving in that legislature?

130. *Senators — The Florida Senate*, THE FLA. SEN., <http://www.flsenate.gov/Senators/#Senators> (last visited Dec. 16, 2016).

131. *Florida House of Representatives for 2016–2018 (Speaker Corcoran)*, FLA. HOUSE REPS., <http://www.myfloridahouse.gov/Sections/Representatives/representatives.aspx> (last visited Dec. 16, 2016).

132. See Sanford C. Gordon & Dimitri Landa, *Do the Advantages of Incumbency Advantage Incumbents?*, 71 J. OF POL. 1481, 1483 (2009) (noting that “[a]bsent redistricting, the ideological characteristics of a district tend to be relatively stable. Thus, an incumbent may enjoy an advantage over challengers in the same electorate that put her in power in the first place.”).

133. See *id.* at 1481. According to Professor Yogesh Uppal's study, a large advantage for re-election exists for members of a state legislature's lower chamber as an incumbent candidate is about thirty percentage points more likely to win an election and receives 5.3 percentage points more votes in the next elections. Yogesh Uppal, *Estimating Incumbency Effects in U.S. State Legislatures: A Quasi-Experimental Study*, 22 ECON. & POL. 180, 197 (2010).

134. Quinnipiac University, *Release Detail: Dems Ahead in Florida, Ohio Senate Races, Quinnipiac Swing State Poll Finds; Toomey Gives GOP Edge in Pennsylvania* June 22, 2015, at 7, https://poll.qu.edu/images/polling/ps/ps06222015_Sp52rg.pdf.

135. Michael Van Sickler, *One-third of Florida Legislature Faces No Opposition at Polls*, TAMPA BAY TIMES (June 20, 2014, 8:46 PM), <http://www.tampabay.com/news/politics/elections/one-third-of-florida-legislature-faces-no-opposition-at-polls/2185371>.

A simple answer is the Fenno Paradox. Under this theory, people hate their legislative body but love their representative.¹³⁶ One reason is that constituents may view the accomplishments of the general body as minimal, but see the immediate impact of their representative's accomplishments for the district on a daily basis—a new park, funding for a community organization, or a grant for the local community college. Another reason is that voters are risk-averse to changes when incumbents present themselves as low-risk actors.¹³⁷

A more complex answer involves analysis of single member districts, gerrymandering, campaign financing favoring incumbents, the access to media and constituency through elected office, and game theory. Regardless, voters tend to re-elect their elected officials, absent a scandal or criminal charges. As an incumbent, a legislator: (1) has instant name recognition, (2) can attract news coverage, and (3) can utilize the powers of the office.¹³⁸

Utilizing this incumbency advantage, legislators can quickly spin the proposed legislative amendment and use resources of their offices to promote the benefits of the amendment in a short time-frame, while opposition to the amendment will lack the same amount of time to build a response.

Further, in this particular context, the incumbency-effect's significance is that it perpetuates a second-order logrolling effect for possible amendments proposed by the Florida Legislature using the Delaware format. A Florida voter will be confronted with voting for the popular incumbent and accepting an unpopular amendment or voting down a popular incumbent, with whom she agrees on the majority of issues, in order to prevent a constitutional amendment.

As discussed above, according to the Supreme Court of Florida, one reason the Florida Constitution requires a one-subject requirement for citizen initiatives is that it “avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support.”¹³⁹ If Florida were to adopt the Delaware method for

136. *Procedural Politics: Does Congress Care About Public Opinion?*, ROLL CALL (Apr. 28, 2014, 6:46 AM), http://www.rollcall.com/news/does_congress_care_about_public_opinion_procedural_politics-232452-1.html; Interestingly, despite this discrepancy, Nate Silver's *FiveThirtyEight* blog has documented a significant correlation between the approval rating of Congress and its members. Harry Enten, *Disliking Congress, as a Whole and as Individuals*, FIFTYTHREEEIGHT (July 1, 2014, 7:09 AM), <http://fivethirtyeight.com/datalab/disliking-congress-as-a-whole-and-as-individuals/>.

137. See David L. Eckles et al., *Risk Attitudes & the Incumbency Advantage*, 36 POL. BEHAVIOR 731, 746 (2014).

138. JOHN L. MOORE, ELECTIONS A TO Z 200, 202–03 (1999).

139. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

amending the Florida Constitution, Florida voters would suffer this same malady, being forced to accept a constitutional amendment approved by the Florida Legislature or vote against their representative, with whom they may agree on a majority of issues. Hence, Florida voters will be forced to accept the bitter and the sweet—the essence of logrolling.¹⁴⁰ Even worse, the Hobson choice will apply “legal force to policies that command only minority support,”¹⁴¹ enshrining in the Florida Constitution provisions that may not even reflect a passing fad of the then-polity.

Similar to the logrolling concern, this Hobson choice also creates a rider problem. “Riding occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second [one].”¹⁴² Here, the legislative amendment creates a riding effect because the majority of voters may approve of their representative but do not approve of the constitutional amendment awaiting a second leg vote; hence, the constitutional amendment free rides on to the re-election of that representative. Voters may prefer to keep their representative more than elect someone new in order to defeat the second leg vote from obtaining approval.

However, one may argue if the voter is passionate enough about the legislative amendment, the elected officials will not approve the second leg of voting in order to appease their constituents. Yet, this assumes the official does not have other political party or leadership pressures within the legislative body to appease¹⁴³ and assumes voters have sufficient access to information about the legislative amendment to form an opinion.

C. *Barriers to Information*

Besides the incumbency effect, the proposed constitutional amendment assumes voters have sufficient access to information on which to vote on the proposed amendment and subsequent legislative amendments to the Florida Constitution. However, voters generally obtain information from television and the Internet, which can provide a skewed view.¹⁴⁴

140. See *supra* pages accompanying footnotes 63–67 (discussing logrolling).

141. Cooter & Gilbert, *supra* note 111, at 706.

142. *Id.* at 707.

143. Matsusaka, *supra* note 76, at 169 (noting theory and evidence suggesting that elected officials are less than perfect agents of the voters).

144. Diana Owen, *The Internet and Voter Decision-Making* 27, INTERNET, VOTING, AND DEMOCRACY CONFERENCE (Laguna Beach, Cal. May, 14–15 2011) (noting that the Internet will eventually become the major source for information); PEW RESEARCH CTR., INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE 2 (2011).

Scholars have argued that news coverage of initiatives, for example, are “often sloppy and lacking in analysis” and that advertisements “fail to analyze issues carefully or reveal all of a measure’s possible consequences,” as they are “designed to persuade, not educate.”¹⁴⁵ Additionally, the Internet creates niche media outlets that tend to disseminate “ideological messages” that create an echo chamber, limiting a fulsome presentation of information for voters.¹⁴⁶

As information sources have increased, so has the difficulty for voters to obtain a thorough analysis of issues and topics on the ballot. In short, the excess of television and Internet coverage creates greater voter confusion and barriers to voters deciphering the nuances of the legislative amendments looming in the wings for a second leg vote when determining whether to elect their representative.

D. *Lack of Constitutional Check and Balance*

Beyond the logrolling effect, the Florida Legislature would have unbridled power¹⁴⁷ to alter the structure of the Florida Constitution, as neither the Governor nor the Florida voters will have direct input on the amendment and may only challenge it, if possible, in a court of law, were the amendment to violate the United States Constitution. Hence, adopting the Delaware method would result in the removal of a check and balance on the Florida Legislature.

Suddenly, political majorities can crystallize partisan stances that may not stand the test of time by utilizing a direct amendment to the Florida Constitution without any popular vote ratification. The caution of the Supreme Court of Florida when addressing an initiative to create a unicameral legislature would equally apply here if the Delaware method were to be adopted:

The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the [s]tate a workable, accordant, homogenous and up-to-date document. All of this

145. Minger, *supra* note 67, at 890–91.

146. OWEN, *supra* note 144, at 8–9.

147. See THE FEDERALIST NO. 51, *supra* note 9, at 319 (James Madison) (“[Y]ou must first enable the government to control the governed, and in the next place oblige it to control itself.”).

could disappear very quickly if we were to hold that it could be amended in the manner proposed in the initiative petition here.¹⁴⁸

Without the voter approval process, the Florida Legislature could potentially strip the constitutional framework to its studs, by utilizing its unchecked power to repeal the constitutional structure, including a limitation on judicial review.¹⁴⁹

This is not an unrealistic fear because recently the Florida Legislature has floated proposals of:

- splitting the Supreme Court of Florida into two Supreme Courts of five members each—one for civil cases and the other criminal—and thus opening the opportunity for more appointments by the party in power;¹⁵⁰
- eliminating merit selection of judges in favor of gubernatorial appointments without any form of a screening mechanism;¹⁵¹
- requiring the Florida Senate approval of all Florida Supreme Court Justices and appellate judges, but giving the Florida Senate *six months* with which to exercise its approval,¹⁵² thus creating a probationary period to evaluate, through a litmus test, the rulings of the appointed judges; and
- seizing from the judiciary final approval of all the rules of procedure, evidence, and conduct that govern Florida's judicial branch.¹⁵³

148. Adams v. Gunter, 238 So. 2d 824, 832 (Fla. 1970).

149. See Little, *supra* note 14, at 479 (“Constitutional provisions such as those that prescribe a structure of government or a procedure for accomplishing governmental tasks, such as enacting laws, deprive the Legislature of the power to repeal the constitutional structure or to change the mandated procedures.”).

150. Howard Troxler, *Legislature Seeks to Saw Off the Judicial Branch*, TAMPA BAY TIMES (Mar. 19, 2011, 2:59 PM), <http://www.tampabay.com/news/politics/stateroundup/legislature-seeks-to-saw-off-the-judicial-branch/1158471>. Interestingly, President Franklin D. Roosevelt attempted this same tactic, expanding the United States Supreme Court in order to obtain favorable members for the New Deal. See generally Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010). (evaluating through a quantitative study, the alleged changed voting pattern of Justice Owen Roberts to thwart the proposed court-packing plan advocated by President Roosevelt).

151. Troxler, *supra* note 150.

152. *Id.*

153. See *id.*

The great check on these proposals was that they needed to obtain voter approval.¹⁵⁴ The new method would unleash constitutional mischief.

E. *Positive Law*

Beyond the hollowing out of Florida's constitutional framework, adoption of the Delaware method may lead to legislation in constitutional clothing. Why would a legislature approve of legislation that can be easily amended and is entitled to less deference when it can adopt the same social or economic policy through a constitutional amendment, which is more difficult to amend and entitled to greater deference? It would not.

Hence, commentators' fear of social policy-based citizen initiatives will be ten-fold in the hands of a legislature, regardless of the political party in power, because of the lack of a checking mechanism. In Florida, without this constraint on the legislative action, Florida will lack protection "against precipitous and spasmodic changes in Florida organic law."¹⁵⁵ As Professor Gordon predicted, the Florida Constitution will be "downgraded to statutory law and a constitutional junkyard."¹⁵⁶

Quickly, the Florida Legislature could shape the constitutional law of Florida to fit passing social and political norms—a fear Justice McDonald raised.¹⁵⁷ Suddenly, the Florida Constitution will become a white paper for the political party in power. Democrats and Republicans will advocate and pass their agenda not through easily amended legislation, but through constitutional mandates that are not easily blunted. The Florida Constitution would revert to the 1885 to 1968 period during which the Florida Constitution was a chameleon and a bloating document with the proliferation of constitutional amendments.¹⁵⁸ This is not a partisan issue, but a constitutional one.

However, supporters of this proposal may: (1) quickly point to Delaware's long use of the amendment process, (2) assert that a legislature allows for fuller debates of amendments than the initiative process, and (3) argue that at its core, America is a republic, not a direct democracy, and notwithstanding that point, voters still must re-elect members of the House of Representatives before the second leg of an amendment vote.

154. See Paula Dockery, Op-Ed, *Florida Courts Under Legislative Attack*, MIAMI HERALD (Nov. 18, 2015, 5:21 PM), <http://www.miamiherald.com/opinion/op-ed/article45386307.html>.

155. Gordon, *supra* note 68, at 422.

156. *Id.* at 414.

157. See Advisory Op. to Att'y Gen. — Ltd. Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring).

158. D'ALEMBERTE, *supra* note 2, at 11–13.

As noted above, demographically, Florida is distinct from Delaware, and, due to that fact, more susceptible to the negative repercussions of this amendment process.¹⁵⁹

As to the second point, supporters may raise the rationale in *Fine v. Firestone*,¹⁶⁰ that the legislative process “afford[s] an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal.”¹⁶¹ However, in that context, the court was discussing the current legislative amendment process, which allows for a popular vote check on the legislative amendments.¹⁶² Moreover, the voters have exercised this check on a routine basis, rejecting seventeen of the eighty-one proposed amendments by the legislature—21% of the time.¹⁶³ More important is which amendments the citizens rejected.¹⁶⁴ When reviewing the rejected amendments, a common theme appears.¹⁶⁵ Citizens typically reject amendments relating to social issues, limitations on the judiciary, or access to education.¹⁶⁶ For example, some of the rejected proposed amendments include:

- allowing the Florida Legislature to reject the Supreme Court of Florida’s rules by a simple majority vote and blocking the re-adoption of the Supreme Court of Florida’s rules;¹⁶⁷
- allowing the Florida State Senate to have confirmation powers for nominations to the Supreme Court of Florida;¹⁶⁸
- generally prohibiting public funding of abortions and prohibiting the Florida Constitution from being interpreted to create broader rights to an abortion than those contained in the United States Constitution, and, by its adoption, overruling court decisions which conclude that the right of privacy under article I, section 23 of the Florida Constitution is broader in scope than that of the United States Constitution;¹⁶⁹

159. See *supra* Part V.A (discussing demographic distinctions between Florida and Delaware).

160. 448 So. 2d 984 (Fla. 1984).

161. *Id.* at 988.

162. *Id.*

163. See *Initiatives/Amendments/Revisions*, *supra* note 85.

164. See *id.*

165. See *id.*

166. See *id.*

167. H.J. Res. 7111, 2011 Leg., Reg. Sess. (Fla. 2011).

168. *Id.*

169. H.R.J. Res. 1179, 2011 Leg., Reg. Sess. (Fla. 2011).

- removing the Blaine Amendment and permitting the use of revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination, or in aid of any sectarian institution;¹⁷⁰
- altering the class size reduction amendment to make the acceptable class sizes larger and reducing the burden on the Florida Legislature for funding.¹⁷¹

Without this check, the Florida Legislature would have been able to assert unilaterally these types of amendments into the Florida Constitution.

Finally, the third argument against direct democracy is valid, as Madison forewarned of the anarchy that ensues within a direct democracy.¹⁷² Yet, a key principle to the functioning of a republican democracy is a check and balance, as 160¹⁷³ “despots would surely be as oppressive as one.”¹⁷⁴

VI. CONCLUSION

Constitutions define our polity, providing a framework within which society can address pressing issues and proactively prevent them. These limiting documents are not without reproach or beyond alteration. However, the adoption of the Delaware amendment methodology is beyond mere alteration. Despite its potential advantages, its negative repercussions are too great to entertain such a proposal. As such, to prevent second-order logrolling and a bloated constitution, the Revision Commission should not recommend the proposed change to the amendment process.

170. H.R.J. Res. 1471, 2011 Leg., Reg. Sess. (Fla. 2011). The Blaine Amendment refers to state constitutional provisions that prohibit public support of religious schools and institutions, which were purportedly similar to a proposed federal constitutional amendment proposed by Representative James G. Blaine in 1875. For a history of the Blaine Amendment, *see* Cauthen, *supra* note 17, at 2141–50.

171. S.J. Res. 2, 2010 Leg., Reg. Sess. (Fla. 2010).

172. *See* THE FEDERALIST NO. 10, *supra* note 9, at 76 (James Madison).

173. *See supra* Part V.A (showing the number of representatives in Florida Legislature). This Article is not questioning the motives of elected officials, who give their time and energy serve the public good. Rather, this Article argues that these elected officials’ desires for good, as they believe it, still need a checking mechanism, as Madison envisioned.

174. THE FEDERALIST NO. 48, *supra* note 9, at 307 (James Madison); *see also* THE FEDERALIST NO. 10, *supra* note 9, at 75 (James Madison) (“Enlightened statesmen will not always be at the helm.”).